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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 761

HILTON HOTELS CORPORATION,
a Delaware Corporation;
ALLEGHENY HOTEL CORPORATION,
a Pennsylvania Corporation; and
SHERATON MID-CONTINENT CORPORATION,
a Delaware Corporation,
Petitioners

v.

THE URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH, a Pennsylvania corporation, and LEON FALK, JR., JOSEPH S. WOHL and GOLDEN TRIANGLE MOTOR HOTEL, INC., a Pennsylvania corporation and the CITY OF PITTSBURGH, PENNSYLVANIA, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MALCOLM ANDERSON
DONALD C. BUSH
Attorneys for Petitioners

1707 Oliver Building
Pittsburgh 22, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX

	PAGE
Opinions Below	19
Jurisdiction	2
Questions Involved	3
Statutes Involved	4
Statement of the Case	5
Argument	8
Reasons for Granting This Writ	11
Conclusion	18
Appendix	
Opinion of the United States District Court for the Western District of Pennsylvania, February 14, 1962	19
Opinion of the United States Court of Appeals for the Third Circuit, October 22, 1962	35

TABLE OF CITATIONS

CASES

Bell v. Hood, 327 U.S. 678	15
Brown v. Bullock, 194 F. Supp. 207, 294 F. 2d 415	14
C.I.R. v. Bilder, 289 F. 2d 291	16
Federal Housing Administration v. The Darlington, Inc. 358 U.S. 84	11
Fitzgerald v. Pan American World Airways, 229 F. 2d 499	15
Hollander v. U.S., 248 F. 2d 247	16
Javor v. Brown, 295 F. 2d 60	17
Jung v. K & D Mining Co., 365 U.S. 335, 2 L.Ed. 2d 806, 78 S.Ct. 764	17
Laughlin v. Riddle Aviation Co., 205 F.2d 948, 949	15
Marshall v. Sawyer, 301 F.2d 639	17

Table of Citations.

CASES	PAGE
Martinez v. Flores, 299 F.2d 888	17
Neiswonger v. Goodyear Tire & Rubber Co., 35 F.2d 761	15
Roosevelt Field v. Town of North Hempstead, 84 F. Supp 456	15
Texas & Pacific R.R. v. Rigsby, 241 U.S. 33	8, 15
STATUTES	
Housing Act of 1949, 63 Stat. 413, 42 USC 1441 et seq.	4, 5
Housing Act of 1954, 68 Stat. 610, 12 USC 1731(b)	11
Housing Act of 1959, 73 Stat. 654, 42 USC 1456(g)	11
Housing Act of 1959, 73 Stat. 654, 42 USC 1455(e)	9
Pa. Urban Redevelopment Law of 1945 P.L. 991, 35 P.S. 1701, et seq.	5
MISCELLANEOUS	
24 American Jurisprudence, Section 11	8
1959 U.S. Code Cong. and Admin. News Vol. 2 p. 2864	13
House Report 2359 of 1958	12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Judges of Said Court:

The petitioners, Hilton Hotels Corporation, Allegheny Hotel Corporation and Sheraton Mid-Continent Corporation, pray that a writ of certiorari be issued to

review the decision of the United States Court of Appeals for the Third Circuit which affirmed the part of the order of the United States District Court for the Western District of Pennsylvania dismissing the complaint filed by the petitioners.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals is reported in 309 F.2d 186 and appears in the appendix at page 19. The opinion of the United States District Court is reported at 202 F. Supp. 486 and appears in the appendix at page 35.

JURISDICTION

The decision of the Court of Appeals sought to be reviewed was entered October 22, 1962.

The jurisdiction of your Honorable Court is involved under Title 28 U.S.C. Section 1254(1).

QUESTIONS INVOLVED

1. Did the local redevelopment authority obtain a contractual right against the United States by reason of approval by a federal agency of an over all redevelopment plan which listed as one of the possible future uses for part of the area designated commercial as "a hotel", which contractual right could not be affected legally by a later congressional amendment which prohibits a hotel from being constructed unless the community obtains a competent independent analysis of the local supply of transient housing and determines that there is a need for such construction and where, after the amendment and without obtaining any such analysis, the authority amended its plan to make the area commercial by vacating a street and converting street area into commercial and rezoning height restrictions and entered into a contract for construction of a hotel on said property when no negotiations, planning, financing, commitment, agreement or option to construct said hotel had been entered into prior to the amendment?

2. Does not the action of the Court of Appeals in affirming an order dismissing the complaint but rendering no decision as to the summary judgment appealed by petitioners create such special circumstances as could be prejudicial to petitioners in later proceedings based on the cause of action so that the decision of the Court of Appeals should be considered as an appealable order and the writ of certiorari granted?

STATUTORY PROVISIONS INVOLVED

The Housing Act of 1949, 63 Stat. 413 as amended, 42 USC 1441, et seq. is the statute primarily involved and subsection (g) of Section 410 of the Housing Act of 1959, 42 USCA 1456(g) is the specific provision:

> "Sec. 410. Section 106 of the Housing Act of 1949 is further amended by adding at the end thereof the following new subsection:
>
> '(g) No provision permitting the new construction of hotels or other housing for transient use in the redevelopment of any urban renewal area under this title shall be included in the urban renewal plan unless the community in which the project is located, under regulations prescribed by the Administrator, has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof has determined that there exists in the area a need for additional units of such housing' "

STATEMENT OF THE CASE

The petitioners operate modern hotels in downtown Pittsburgh. They do not have sufficient transient occupants to make their hotels profitable. They have sought in vain to persuade the City of Pittsburgh and its Urban Redevelopment Authority of Pittsburgh to follow the mandate of the Housing Act of 1949 as amended by the Act of September 23, 1959, in which Section 410 of that Act, 42 USC (1456(g) amended Section 106 of the Housing Act of 1949 to require an independent survey of the necessity for transient housing in an area before federal funds are spent to create unnecessary competition.

The City of Pittsburgh created The Urban Redevelopment Authority of Pittsburgh as authorized by the Commonwealth of Pennsylvania by the Pennsylvania Urban Redevelopment Law of 1945, P.L. 991. This Act was passed expressly to permit local Pennsylvania communities to avail themselves of federal funds. The City and The Urban Redevelopment Authority have functioned in a manner that has won nation-wide acclaim. As part of the City of Pittsburgh's renaissance and as authorized under the Housing Act of 1945 as amended by the Act of 1954, the Authority acquired a large tract of land which was known as the "Lower Hill". The area is a rounded ridge between the Monongahela River and the Allegheny River and only a short distance removed from the confluence of those rivers which forms the downtown area of Pittsburgh known as the "Golden Triangle". In fact, the tract is so close to this fabulous area that the commercial defendant has appropriated the name "Golden Triangle Motor Hotel, Inc.".

The original Redevelopment Area Plan of this area was proposed and submitted by the Authority to the proper representative of the Housing & Home Finance Administrator; and on October 11, 1955 a contract was entered between the Authority and the United States relating to the Redevelopment Plan. The Redevelopment Plan provided for the redevelopment of various parcels of land into commercial, parking, roadway, and some five other land classifications. One of the permitted uses for land designated as commercial was "hotel". Motels are not listed as a permitted use. Prior to the Housing Act of 1959 no negotiations, planning, financing, commitment, agreement or option to construct a hotel had taken place among any of the defendants.

The Housing Act of 1959 then was passed. Yet, the Authority not only refused to seek a survey of the need for transient housing but steadfastly maintained that said amendment was inapplicable. The Authority with approval of the Housing & Home Finance Administrator amended its 1955 Plan subsequent to the Housing Act of 1959 in many respects. One amendment to the Plan pertinent to our inquiry was the change of a 60′ wide street from a street classification to a commercial classification. The proposed hotel-motel will be built on this area. Another change was in the proposed financing arrangements of the commercial defendant to the requirements of the Housing & Home Finance Administrator.

On July 31, 1961 the plaintiffs, not having been protected by the Urban Redevelopment Authority, the City of Pittsburgh or the Housing & Home Finance Agency, filed an action against defendants in the United

States District Court for the Western District of Pennsylvania to enjoin defendants from constructing a new hotel on the particular parcel of land involved until a survey has been taken showing a need for additional transient housing. The defendants filed a motion for summary judgment based on lack of standing to sue, failure to state a claim, and lack of jurisdiction over the subject matter. The District Court ordered that summary judgment be entered and that the complaint be dismissed. It felt that changes made by the defendants in the 1955 Plan were "minimal" and that the Housing Act of 1959 could not and did not affect rights acquired prior thereto. In passing, it expressed doubt as to the standing of plaintiffs to sue. Plaintiffs appealed the summary judgment. The Court of Appeals placed additional emphasis on the lack of standing to sue and affirmed the part of the order dismissing the complaint.

ARGUMENT

The applicable Housing Acts do not confer specifically the right to sue upon the petitioners. However, such a right is implied by said Acts as well as on the equitable rights to sue as found in *Texas & Pacific R.R. v. Rigsby,* 241 U.S. 33, 60 L.Ed. 874 (1916). It is stated in 24 *Am. Jur.* § 11 that:

> "When an individual or a private citizen suffers an injury peculiar to himself from a public wrong which is not sustained by the public in general, he may sue in his own name and for his own benefit for such wrong".

The varous administrations of the Housing & Home Finance Agency have suggested the removal by Congress of the survey proviso of the Housing Act of 1959. Their dislike for this provision of the Act is no assurance of any protection for the plaintiffs, nor, for that matter, of the public policy as outlined by Congress. The local Authority has more land than it can digest. The City desperately needs taxes and taxable property. These governmental entities are not likely to protect the petitioners. Petitioners must rely on a remedy implied in the creation of the right, or the part of the Housing Act requiring a survey will not be enforced.

The survey, if held, would reveal that present transient housing is more than adequate. (This fact is admitted by the pleadings) This determination would require the defendants to make other use of the land involved, which could result in true public benefit. Would this violate any of the alleged vested rights of defendants? Certainly, no such rights are asserted by

the defendant "Golden Triangle Motor Hotel, Inc." which was not in existence in 1959 nor by Messrs. Falk and Wohl.

The City and the Authority assert that the approval in 1955 of this Plan called for constant supervision and review and that it has provisions for amendment and was amended as heretofore set forth. Yet, the defendants have not met or answered the challenge of whether the same Housing Act of 1959 which contained a section calling for Public Disclosure, 73 Stat. 654, 42 USC 1455(e), by the redeveloper within an urban renewal area and later regulations issued by the Administrator to enjoin against racial discrimination in the Plan do not modify the so called "vested rights" granted in the 1955 approval of a general plan. The Public Disclosure provision which is as follows:

> "Sec. 470. Section 105 of the Housing Act of 1949 is amended by adding at the end thereof the following new subsection:
>
> '(e) No understanding with respect to, or contract for, the disposition of land within an urban renewal area shall be entered into by a local public agency unless the local public agency shall have first made public, in such form and manner as may be prescribed by the Administrator, (1) the name of the redeveloper, together with the names of its officers and principal members, shareholders and investors, and other interested parties, (2) the redeveloper's estimate of the cost of any residential development and rehabilitation, and (3) the redeveloper's estimate of rentals and sales prices of any proposed housing involved in such redevelopment

> and rehabilitation: Provided, That nothing in this subsection shall constitute a basis for contesting the conveyance of, or title to, such land.'"

was immediately applied by the Housing & Home Finance Agency by LPA Letter No. 185 (R. 74a-77a)[1] to all projects new or old. The Housing & Home Finance Agency and the local Authority immediately published and filed the information accordingly. No cries of anguish or outrage were heard of vested rights or impairment of contract in these instances.

This blowing hot and cold and enforcement of only the regulations an agency likes bespeaks an odd standard: The general plan can be amended by Congress and the amendment enforced by the Housing & Home Finance Agency only if the Authority desires to so amend; but, on the other hand, the Authority at its option can amend (as in the case of changes of use of land) so as to circumvent the Act of Congress.

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1. "R." refers to the printed record consisting of appellants' appendix from 1a-137a.

REASONS FOR GRANTING THE WRIT

1. The petitioners are the persons sought to be aided by an Act of Congress, specifically Section 410 of Housing Act of 1959. May this right be avoided with impunity by the persons charged with its administration? We personally remember listening to a speech at Pittsburgh by the then Commissioner of Internal Revenue in which he said flatly that the Act of 1951 (wagering tax statute) was a bad act and that he would not enforce it. There has lingered the chill felt at such public contempt for law by the specific person charged with enforcement (and then there was no special class to be aided). Here, there is a difference. There are specific persons wronged, the injured hotels. Here, the law provides an easy and applicable remedy—make the survey. The writ should be granted to reassert the necessity of keeping the executive veto on enforcement of congressional acts solely in the hands of the Chief Executive.

The primary philosophy behind using federal funds for housing has been to provide needed residential housing. Enthusiastic administrators later got into the area of hotels and transient housing. The case of *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, cert. den. 358 U.S. 937 (1958) is illustrative. This case concerned Section 132 of the Housing Act of 1954, 68 Stat. 610, in which the new Section 513 (12 USC 1731(b)) was added to the Housing Act. Subsection (a) of 12 USC 1731(b) stated that housing to be built with mortgages under the Act was to be used "principally for residential use," it being the intent of Congress to exclude transient housing. Section (b) states that no

new housing wherein the mortgage is to be insured by F.H.A. shall be operated for transient hotel purposes except where such use was expressly authorized prior to May 28, 1954.

The Housing Act of 1959, requiring the survey, was not a new doctrine; it was a reassertion of the primary philosophy. An example of the determination and unequivocable intent of Congress concerning this matter throughout the Housing Acts is found in House Report 2359 of 1958. On page 32 it reads as follows:

> "Your committee wishes to call attention to previous declarations by the Congress that the basic purpose of the various Government-assisted housing programs is to assist sound permanent housing for *residential* use. Your committee wishes to reaffirm its intention that the prohibition against transient or hotel use is applicable to *all housing programs*, whether of an insurance or a loan category, authorized within the various programs under the Housing and Home Finance Administrator.
>
> "Your committee further wishes to state its intention in connection with the urban renewal program that communities should have competent independent analysis of the local supply of transient housing before permitting the inclusion of new hotels in redevelopment plans."

The amendment clearly was designed to prevent the construction of unnecessary transient accommodations. It was not attempting to prohibit the inclusion of transient housing in all urban renewal projects. It merely was providing a reasonable safeguard and regulation

against irresponsible or unsound projects of this particular class because the basic purpose of the Act is not to provide the individual defendants with a luxury hotel but to provide residential housing.

The integrity of this federal aid program and urban redevelopment is being subverted here by direct refusal to carry out the Congressional intent as indicated in the 1959 U. S. Code Congressional and Administrative News Volume 2, page 2 which comments on this specific legislation as follows:

> "Hotels And Other Transient Housing
>
> Section 410—Amends Section 106 of the Housing Act of 1949 to prohibit hotels and other transient housing *from being constructed* in an urban area unless the community obtains a competent independent analysis of local supply of such housing and determines that there is a need for such housing."

Congress was perfectly clear on the purpose of this section. It was restating previous declarations of policy. It did not segregate redevelopment plans and urban renewal plans. It specifically speaks of construction and the comment speaks of construction.

As more and more agencies and administrators are required by Congress to implement its duty of governing this republic, it is becoming increasingly necessary for the individual directly affected to have some recourse against arbitrary action and nonaction of agencies in direct violation of the Acts of Congress. Congress, through its various investigating and "legislative over-

sight" committees, has become increasingly aware of this need but the remedies being used may be more destructive of the democratic processes than the oversights themselves. This Honorable Court should not avoid this major area of civil discord. The federal courts must be available for the challenge of acts and failure to enforce acts of administrators of state and federal entities that violate both an Act of Congress and the private rights thereunder created.

The Public Disclosure section was passed at the identical time as the survey requirement and the Public Disclosure section contained a specific provision to forestall litigation which Congress did not wish commenced. It certainly is indicative of the awareness of Congress of litigation and that it anticipated, expected and approved suits brought for violation of Section 106(g).

Petitioners are attacking the construction of luxury transient housing in an urban renewal area without a survey showing a need therefor. Since the District Court expresses no opinion on this matter, we do not wish to belabor the point but do want to call this Court's attention to *Brown v. Bullock*, 194 F. Supp. 207, 294 F. 2d 415 (CA 2 1961), a decision in which the District Court opinion gives extensive coverage of the private rights and remedies of individuals that are implied from various Acts of Congress. This case specifically involves the Investment Company Act of 1949, 15 USCA 80a-36, but also reviews the Securities & Exchange Commission statutes, the Public Utilities Commission Holding Company Act, the Trust Indenture Act, the National Labor Relations Act and others.

Reasons for Granting the Writ.

One of the cases therein of particular significance concerns *Roosevelt Field v. Town of North Hempstead*, 84 F. Supp 456 (SDNY 1949) in which the plaintiff-Airfield sued to enjoin the Town from erecting a water tower that would be a hazard to navigation. The right to sue was predicated on the Air Commerce Act of 1926 which required that notice be given before the building of a structure near an airport. (Just as under the Housing Act which requires a survey showing need before the construction of hotels). The Air Commerce Act contained no provisions specifically authorizing the airport to seek an injunction.

The Court implied that right from the statute (84 F. Supp. at page 459:)

> " 'It is not necessary that a federal statute in terms confer a right of suit upon persons intended to be benefited. *Texas & Pacific R.R. v. Rigsby*, 1916, 241 U.S. 33, 36 S.Ct. 842, 60 L.Ed. 874. And in at least one later case it has been held that rights similar to those here asserted by the plaintiff may be created even by federal regulations, which do not specifically erect rights or impose liabilities. *Neiswonger v Goodyear Tire & Rubber Co.*, 1929, D.C. N.D. Ohio, 35 F.2d 761. The case seems to be one where it becomes necessary for the district court to assume jurisdiction to determine whether the federal right has been in effect invaded, of. *Bell v. Hood*, 1946, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939.'
>
> "The *Roosevelt Field* case has been cited with approval in *Fitzgerald v. Pan American World Airways*, 2 Cir., 1956, 229 F.2d 499, 502, note 3; *Laugh-*

lin v. Riddle Aviation Co., 5 Cir., 1953, 205 F.2d 948, 949. It illustrates the broad rule: 'The implications and intendments of a statute are as effective as the express provisions.' *Laughlin v. Riddle Aviation Co.*, supra."

On page 224 of the *Brown* case, supra, the Court concludes that:

> "Implied rights of action are not contingent on stautory language which affirmatively indicates that they are intended. On the contrary, they are implied unless the legislation evidences a contrary intention."

In the same case the Court also repeats a principle that there is no justification, in dismissing a complaint:

> "unless it appears to a certainty that plaintiffs are entitled to no relief under any state of facts which could be proved in support of the claim."

When Congress mandated an analysis of the need for new hotels and transient housing, it was concerned with new construction and believed the requirement was a necessary safeguard to be enforced. This intent and purpose is evident in the Act and the Court should interpret the law liberally to give effect to its purpose and intent. *C.I.R. v. Bilder*, 289 F.2d 291 (CA 3 1961) *Hollander v. U. S.*, 248 F.2d 247 (CA 2 1957) This Act is not the imposition of a penalty but a procedural safeguard against unsound projects and ones outside the scope of the Housing Acts.

2. The Order of the United States Court of Appeals for the Third Circuit in affirming the part of the order

of the United States District Court dismissing the complaint but rendering no decision on the summary judgment from which petitioner appealed raises doubt as to the nature and effect of said order. The decision rendered may be construed by the respondents impliedly as a final judgment affecting the petitioners and the timeliness of further proceedings should a writ of certiorari not be issued to review said decision.

The original motion was filed on the basis that petitioners have no standing to bring this suit, have failed to state a claim and that the court lacks jurisdiction over the subject matter. The Order of the Court of Appeals appears to be based on lack of standing to sue, which is jurisdictional; but the decision's discussion of some of the facts, its comment thereon, and its affirmance of the lower court's order dismissing the complaint without mention of the summary judgment under appeal makes the order subject to interpretation possibly prejudicial to petitioners' cause of action *Javor v. Brown*, 295 F.2d 60 (1962), *Martinez v. Flores*, 299 F.2d 888 (1962) whether by amendment in further district court proceeding *Jung v. K & D Mining Co.*, 365 U.S. 335, 2 L.Ed. 2d 806, 78 S.Ct. 764 (1958), a new action or in a different forum.

Because of the special circumstances of the Court of Appeals' Order, it should be considered as an appealable order and the writ granted. *Marshall v. Sawyer*, 301 F.2d 639 (1962).

CONCLUSION

The decision below is in direct violation of the rights of all citizens that federal funds be used for needed, sound, permanent housing and of the specific rights granted these particular petitioners that hotels and other transient housing will not be constructed in urban renewal areas unless an analysis of such housing determines that there is a need for same. Petition for certiorari should be granted.

Respectfully submitted,

MALCOLM ANDERSON
DONALD C. BUSH
Counsel for Petitioners

APPENDIX

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 61-442

PITTSBURGH HOTELS ASSOCIATION, INC.;
A PENNSYLVANIA CORPORATION;
CARLTON HOTEL CORPORATION,
A PENNSYLVANIA CORPORATION;
HILTON HOTELS CORPORATION,
A DELAWARE CORPORATION;
ALLEGHENY HOTEL CORPORATION,
A PENNSYLVANIA CORPORATION;
PITTSBURGHER HOTEL COMPANY,
A PENNSYLVANIA CORPORATION; AND
SHERATON MID-CONTINENT CORPORATION,
A DELAWARE CORPORATION,
Appellants

v.

THE URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH, A PENNSYLVANIA CORPORATION, AND LEON FALK, JR., JOSEPH S. WOHL AND GOLDEN TRIANGLE MOTOR HOTEL, INC., A PENNSYLVANIA CORPORATION, AND THE CITY OF PITTSBURGH, PENNSYLVANIA,
Appellees

Opinion and Order

MARSH, District Judge.

The plaintiff hotel corporations bring this action to enjoin the defendants, Golden Triangle Motor Hotel, Inc. and Falk and Wohl, its organizers and principal stock-

holders, from erecting, maintaining and operating a hotel or transient housing facilities on a parcel of land (Parcel "B"[1] in Pittsburgh owned by the Urban Redevelopment Authority of Pittsburgh (Authority).[2]

The action arises under the laws of the United States: Title I of The Housing Act of 1949, entitled Slum Clearance and Community Development and Redevelopment,[3] as amended through September, 1959.[4]

Without answering the complaint defendants moved for summary judgment with a supporting affidavit (first Hazlett affidavit). After the hearing on the motion defendant filed another supporting affidavit (second Hazlett affidavit); thereupon the plaintiffs examined the files and records of the Authority, took and submitted the deposition of Robert B. Pease, Executive Director of the Authority, taken as on cross-examination, and served a Request for Admissions to which defendants have responded as directed by order of court.

It is the opinion of the court that the rights of defendants are fixed by statutes, contracts, and supplemen-

1. See map of Parcel "B" in the proposed Land Disposition Contract at Schedule "2" (plaintiffs' Ex. 10-B). The Parcel is also substantially shown as Parcel "A" on the map attached to the Redevelopment Area Plan (Ex. B) and marked Exs. B, B-1, and B-2.

2. This Authority was established under the Urban Redevelopment Law of Pennsylvania, Act of May 24, 1945, P.L. 991, 35 Purdon's Pa. Stat. Ann. § 1701, as amended.

3. Act of July 15, 1949, 63 Stat. 413, Title I, p. 414.

4. The Housing Act of 1949 has been repeatedly amended: the amendments pertinent to this action are the Housing Act of 1954, approved August 2, 1954, 68 Stat. 622, 42 U.S.C.A. § 1450, particularly § 312 thereof, 68 Stat. 629; and subsection (g) of § 410 of the Housing Act of 1959, approved September 23, 1959, 73 Stat. 674, 42 U.S.C.A. § 1456(g) (1961 Supp.).

tal documents; that the complaint, deposition, admissions, and affidavits clearly show that there is no genuine issue as to any material fact; and that the defendants are entitled to judgment as a matter of law. Rule 56 (c), Fed. R. Civ. F.

In arriving at these conclusions, we take as true all the well-pleaded facts contained in the complaint, as well as the admissions on file, giving to plaintiffs the benefit of all reasonable inferences to be drawn therefrom. *Bragen v. Hudson County New Company*, 278 F. 2d 615, 617 (3rd Cir. 1960); *United States v. St. Paul-Mercury Indemnity Co.*, 194 F. 2d 68, 72 (3rd Cir. 1952). So taken we do not think they disclose a cause of action on which relief can be granted; for if all of the alleged and admitted facts were offered in evidence and proved at trial, a judgment would have to be directed in favor of defendants. *Shipley v. The Ohio National Life Ins. Co.*, 296 F. 2d 728 (3rd Cir. 1961); *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F. 2d 399, 405 (2d Cir. 1945), citing *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 624; Moore's Federal Practice and Procedure, § 56.15[1], p. 2107, § 56.15[3], p. 2128, § 56.15[8], p. 2165.

Simply because defendants filed objections to certain of plaintiffs' Request for Admissions does not show, as plaintiffs contend, that there are genuine issues of material fact which would preclude summary judgment. Objections were sustained to 19 Requests because plaintiffs wanted defendants to agree to certain opinions, conclusions, conjectures, and interpretations which the plaintiffs placed upon certain documents, letters, plans and statutes. See opinion and order filed January 5, 1962. Should defendants be deemed to dispute these opinions,

conclusions, conjectures, and interpretations, such disputes would involve issues of law rather than issues of fact.[5]

The two affidavits filed by defendants do not attempt to dispute any material fact alleged in the complaint but merely provide the contractual and documentary background of the litigation. And, of course, the court is not required to accept as true the conclusions of law contained in the complaint, e.g., §§ 28, 29. (Paragraph references are to paragraphs of the complaint herein.) *Delaware, Lackawanna and Western R. Co. v. Kingsley*, 189 F. Supp. 39 (D.N.J. 1960); Moore's Federal Practice and Procedure, § 56.15[3], p. 2131.

The facts thus disclosed appear to be as follows: Pursuant to Title I of the Housing Act of 1949, on January 3, 1952, the Authority entered into a "Contract for Advance" with the Government for surveys and plans in preparation of a project known as the Lower Hill Redevelopment Project, Redevelopment Area No. 3 (attached to the second Hazlett affidavit and marked Ex. A). On February 21, 1955, pursuant to § 312 of the Housing Act of 1954, 68 Stat. 629,[6] the Authority adopted a

5. For example, plaintiffs contend that the "intent" of Congress in enacting § 410 of the Housing Act of 1959, 73 Stat. 674, § 1456(g) of Title 42 U.S.C.A. (1961 Supp.) (quoted infra), is a disputed issue of fact, and for that reason summary judgment should be denied. (Tr., p. 111; p. 1 of Memorandum Brief of Plaintiffs dated Dec. 1, 1961.) We think that the intent of Congress with respect to this statute is a question of law. Cory Corporation v. Sauber, 266 F. 2d 58 (7th Cir. 1959); Woods v. Petchell, 175 F. 2d 202 (8th Cir. 1949); 82 C.J.S. Statutes § 312; cf. Watkins v. National Electric Products Corporation, 165 F. 2d 980 (3d Cir. 1948).

6. "SEC. 312. Nothwithstanding the amendments of this title to title I of the Housing Act of 1949, as amended, the Administrator, with respect to any project covered by any Federal aid contract executed, or

Resolution formally requesting that the Administrator of Housing and Home Finance Agency (HHFA) "continue said project under the provisions of the Housing Act of 1949 as amended and in effect prior to August 2, 1954".[7] Plaintiffs admit the existence of both these documents (Tr. of hearing of Nov. 17, 1961, pp. 37, 38).

In accordance with Pennsylvania law, the City Planning Commission of the City of Pittsburgh prepared and recommended to the Authority a Redevelopment Area Plan for Redevelopment Area No. 3. This area comprises the Lower Hill District adjoining the Central Business District of Pittsburgh; it consisted of 46 city blocks together with access streets, making a total of 105 acres (§ 15).

The Redevelopment Area Plan,[8] dated June 7, 1955, was promptly approved by the Authority and City Council. On October 11, 1955, a Loan and Grant Contract[9] was executed between the Government and the Authority. In accordance with the aforementioned Resolution adopted by the Authority, the Loan and Grant Contract specifically stated that it was executed for the

prior approval granted by him under said title I before the effective date of this Act, upon request of the local public agency, shall continue to extend financial assistance for the completion of such project in accordance with the provisions of said title I in force immediately prior to the effective date of this Act."

7. See second Hazlett affidavit attached to defendants' supplemental brief in support of defendants' motion for summary judgment. This affidavit is accepted by the court after giving plaintiffs an opportunity to oppose same by counter-affidavit.

8. The Redevelopment Area Plan, its two Modifications and the RHFA approvals are marked Ex. B, and accompanied the first Hazlett affidavit.

9. The Loan and Grant Contract and its Amendments are marked Exs. A-1 to A-9, inclusive, and accompanied the first Hazlett affidavit.

purpose of extending federal financial assistance to the Authority to "carry out a certain slum clearance and urban redevelopment project * * * under Title I of the Housing Act of 1949 as amended *prior to the enactment of the Housing Act of 1954*". (Emphasis supplied.) The existence of these documents is not disputed.

The Loan and Grant Contract approved the Redevelopment Plan and expressly contemplated that amendments to it might be made from time to time. See Part II, Art. I, § 101 (B) (3), p. 1.

The estimated cost of acquiring the properties in the Redevelopment Area and of demolition of buildings, etc. was in excess of $18,000,000 (18). It is undisputed that the grant agreed to by the United States is nearly $9,000,000, by the Commonwealth of Pennsylvania $1,000,000, by the City of Pittsburgh $3,000,000; Authority loans underwritten by the United States are in excess of $14,000,000, about 81% of which has been expended.[10]

The Redevelopment Plan provided for the redevelopment of the various parcels of land in the project area into commercial, cultural, parking and residential uses, and the maps in the Plan show the location of existing, contemplated and eliminated streets. The land comprising Parcel "B" contains approximately 5.34 acres and was designated for commercial land use purposes in the Plan. Chatham Street, 60 feet wide, intersected the Parcel for a distance of approximately 300 feet (¶ 16.).[11]

10. See first Hazlett affidavit.

11. See Plan, p. 6, and attached maps marked Exs. A, D, and D-1. The maps show that only the southern portion of Chatham Street intersects Parcel "B".

The Plan specifically provided that a "hotel" was permitted on land designated for commercial use (see Plan sub-section F-2-b(2) (a), p. 14). The portion covered by Chatham Street was to be used as a public thoroughfare and no structure was permitted thereon. The Plan limited the height of any building to be constructed on "the Parcel adjacent to the Liberty Crosstown Thorofare at Fifth Avenue" to "two stories or twenty feet (see Plan, subsection F-2-b(2) (d), p. 15; ¶ 17). The restricted parcel appears on maps marked Exhibits B, B-1, and B-2 attached to the Plan, and it is a small triangular piece west of Chatham Street, north of Fifth Avenue, and east of the Crosstown Boulevard (also referred to in the complaint and text of the Plan as Liberty Crosstown Thorofare).

Subsequently, the Plan was modified in several respects and the modifications were approved by the HHFA.[12] Modification No. 1, approved by City Council on March 4, 1957, inter alia, reduced the width of that part of Chatham Street which interests Parcel "B" from 60 feet to 44 feet (¶ 21.) Modification No. 2, approved by City Council on September 27, 1960, entirely removed that part of Chatham Street which intersected Parcel "B" and changed the location of streets abutting or crossing the parcel to the north and west (¶ 22). (See also maps attached to Modification No. 2 and identified as B-2 and D-1.)

On November 1, 1960, individual defendants Wohl and Falk, on behalf of themselves and a company to be organized by them, made an offer to the Authority for

12. Section J-1, p. 24, of the Plan provided for its modification. The HHFA approvals are included in part 4 of Ex. B.

a six-month option to enter into a 99-year lease for the purpose of redeveloping Parcel "B" "with an eight-story motor hotel in excess of twenty feet in height." The offer provided for certain rentals and the right to purchase during the term (¶ 23).

The Authority accepted the offer, and Falk and Wohl incorporated the Golden Triangle Motor Hotel, Inc. "for the purpose of * * * developing the parcel in question for use as a hotel" (¶¶ 24, 25).

On June 8, 1961, a six-month Option Agreement[13] and Contract for Disposition [14] were executed by the Authority and Golden Triangle Motor Hotel, Inc., pursuant to approval of the City Council on May 22, 1961 (¶ 26).[15]

The Authority has or is about to enter into a contract with Golden Triangle Motor Hotel, Inc. for the purpose of implementing the offer of Wohl and Falk, i.e., developing Parcel "B" for use as a hotel (¶ 27).

The Option Agreement and the Contract for Disposition, as changed, were approved by City Council on November 13, 1961, and by the Mayor of Pittsburgh on November 21, 1961; and the option was extended to May 23, 1962.[16]

In the Housing Act of 1959, Congress by § 410, 73 Stat. 674, 42 U.S.C.A. §1456(g) (1961 Supp.), added subsection (g) to the Housing Act of 1949 (¶ 14). This

13. Plaintiffs' Ex. 10-A.
14. Plaintiffs' Ex. 10-B.
15. Plaintiffs' Ex. 9.
16. We take judicial notice of Council's action.

subsection, hereinafter referred to as the 1959 Amendment, provides as follows:

> "(g) No provision permitting the new construction of hotels or other housing for transient use in the redevelopment of any urban renewal area under this title shall be included in the urban renewal plan unless the community in which the project is located, under regulations prescribed by the Administrator, has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof has determined that there exists in the area a need for additional units of such housing."

The City of Pittsburgh and the Authority have not caused to be made an independent analysis of the local supply of transient housing (¶ 28).

The supply of transient housing in Pittsburgh is now ample, and will so remain for some time to come, and, if the proposed hotel is erected, plaintiffs' land and building investments will be injured, placed in financial jeopardy, and may lead to bankruptcy and loss of employment (¶ ¶ 30, 31, 32).

Thus plaintiffs conclude that the proposed construction of a hotel by the defendants Wohl, Falk and their corporation, Golden Triangle Motor Hotel, Inc., is a violation of the Plan and the 1959 Amendment (¶ 29).

Plaintiffs do not aver in their complaint, or admit,[17] that the Contract for Disposition has received final approval of the HHFA Administrator who has the

17. See. Tr. of hearing of Nov. 17, 1961, pp. 17, 34; but see, p. 47 of the Pease deposition.

ultimate power to approve or disapprove the construction of the proposed hotel. However, since the court has been assured by counsel for defendants and the Acting Administrator that the Disposition Contract has been in fact approved despite the alleged violations, the complaint will not be dismissed as being premature.

There is no doubt that a federal aid contract was executed prior to August 2, 1954, the effective date of the Housing Act of 1954;[18] that the Authority by appropriate Resolution, as authorized in § 312 of the Act of 1954,[19] requested the Administrator to continue to extend financial assistance for the Lower Hill Redevelopment Project, Redevelopment Area No. 3, in accordance with the provisions of Title I of the Housing Act of 1949 prior to the Housing Act of 1954. The Loan and Grant Contract specifically provided that it was executed "under Title I of the Housing Act of 1949 as amended prior to the enactment of the Housing Act of 1954". In our opinion the Authority and the Government have in their contract, pursuant to Congressional approval (§ 312), a built-in provision which authorizes the completion of the Lower Hill Project No. 3 with federal financial assistance pursuant to Title I of the Housing Act of 1949 *as amended prior to 1954*, and that the subsequent 1959 Amendment is not applicable. Thus the unrestricted right of the Authority to agree with Golden Triangle Motor Hotel, Inc. to erect a hotel on

18. See "Contract for Advance" attached to the second Hazlett affidavit.

19. Section 312 is quoted at f.n. 6; it is a savings provision "* * * to permit * * * the completion * * * of projects * * * under contract for plans and surveys, prior to * * * [August 2, 1954]." U.S. Code Congressional and Administrative News, 1954, vol. 2, p. 2805.

Parcel "B" as provided in the Redevelopment Plan of 1955 has not been limited by the 1959 Amendment; and the competition to which plaintiffs so strenuously object is lawful.

In addition, and materially strengthening this conclusion is the prospective construction which we think must be placed upon the 1959 Amendment. The settled rules of statutory construction teach that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively. Hassett v. Welch, 303 U.S. 303 (1938); In re Moneys Deposited, etc., 243 F. 2d 443 (3d Cir. 1957).

> "Accordingly, it is a usual rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their purview and scope *coming into existence subsequent to their passage.*" Vol. 82 C.J.S., Statutes § 319. (Emphasis supplied)

What Congress in explicit language proscribed was a "*provision* permitting the new construction of hotels" being included in an "urban renewal plan" unless an analysis demonstrating a eed therefor is made. (Emphasis supplied.) In our opinion by applying the above-stated principle of statutory construction to the 1959 Amendment, it should be construed to operate on new plans submitted for approval and financial aid after the effective date of that Act of 1959, and perhaps, on a post-1959 modification of an old plan, if said modification contains a new provision permitting new construction of a hotel. The Amendment does not operate retro-

actively and thus does not affect the provision permitting the new construction of a hotel as contained in the Redevelopment Plan of 1955.

The plaintiffs contend that the proposed construction of a hotel on Parcel "B" is a violation of the 1959 Amendment because subsequent to its effective date, Modification No. 2 eliminating Chatham Street was approved, and the Falk and Wohl Option Agreement and the Contract for Disposition were executed. Consequently, the land formerly designated under the Plan for use as a street will now be put to commercial use, i.e., occupied by a portion of the proposed hotel without the prior independent analysis required by the Amendment. They argue that the Amendment was enacted for their benefit, and therefore they are entitled to have the erection of a hotel on Parcel "B" enjoined. We are constrained to disagree.

The land area which was formerly the southern portion of Chatham Street is minimal, and the Authority, with the approval of Council (section I of the Plan, p. 22), had the power and duty to conform the streets, especially portions of intersecting streets, to meet the requirements of the various commercial redevelopment projects as they arose and were accepted. Section J of the Plan specifically authorized modifications and both modifications were approved by the HHFA. The proposed construction of a hotel on Parcel "B" as amended is the exercise of a contractual right possesed by the Authority for the benefit of the City of Pittsburgh pursuant to the Redevelopment Plan and the Loan and Grant Contract of 1955, which designated that Parcel exclusively for commercial uses including a hotel.

We hold that the 1959 Amendment is not applicable to the 1955 Redevelopment Plan, as modified, to the Loan and Grant Contract, as amended, or to the Disposition Contract between the Authority and the Golden Triangle Motor Hotel, Inc., and, thus, plaintiffs have not stated a claim on which equitable relief can be granted.

We agree with plaintiffs' counsel that Congress has the power to regulate federally-financed redevelopment projects and to require independent analysis of the need for transient housing prior to new construction, but our examination of the pertinent legislation prior to the 1959 Amendment has convinced us that Congress did not exercise that power. A Congressional policy precluding the use for transient purposes of housing built with the aid of mortgages insured under the National Housing Act of 1934 (12 U.S.C.A. § 1701) was made crystal clear in 1954 by an addition to that Act (12 U.S.C.A. § 1731b(i)) authorizing hotel owners to seek injunctions against violations. Thus it appears that Congress was very much aware of the policy, especially in 1954 when it enacted the Housing Act of that year; but notwithstanding, as revealed by an examination of that Act and the several Housing Acts which followed, it was not until 1959 that Congress actually applied that policy to urban renewal plans and prohibited provisions permitting new construction of hotels and transient housing from being incorporated into such plans thereafter.

With respect to construction of transient housing in redevelopment and renewal areas, it seems that during the period from 1949 to 1959, Congress was content to rely upon the judgment of the Administrator, or his delegates, and the good faith and economic acumen of the

public-spirited citizens comprising the public authorities, planning commissions, and the city councils involved. The legislative history, we think, clearly negatives any intent on the part of Congress to make the 1959 Amendment applicable to pre-1959 provisions permitting new construction of hotels and transient housing.

Moreover, the Housing Acts were not passed for the benefit of hotels,[20] and if the 1959 Amendment is correctly construed to be prospective, plaintiffs have no standing to maintain this legal attack upon the 1955 Plan and its provision permitting the construction of a hotel. If plaintiffs and their employees will be financially injured, as they allege, by the prospective lawful competition, such injuries are damnum absque injuria. Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Taft Hotel Corporation v. Housing & Home Finance, 162 F. Supp. 538, 539-540 (D. Conn. 1958), *aff'd* 262 F. 2d 307, 308 (2d Cir. 1958); Gart v. Cole, 166 F. Supp. 129 (S.D. N.Y. 1958), *aff'd* 263 F. 2d 244 (2d Cir. 1959).

Plaintiffs are not parties to any of the contracts involved. The HHFA which is a party to the Loan and Grant Contract is not a party to this suit. Conceding that plaintiffs could establish all the facts alleged in their complaint at a trial, including the averment that the height restriction contained in the Plan will be violated, and, in addition, (1) that other irregularities and ultra vires acts exist in the manner in which the Govern-

20. We express no opinion on the contention that the 1959 Admendment was passed for the benefit of hotels and that since its enactment they have legal standing to enforce it because, assuming the affirmative to be the case, such standing would be effective only against post-1959 provisions permitting construction of hotels and transient housing.

mental agencies propose to dispose of Parcel "B" pursuant to the Redevelopment Plan of 1955; (2) that public hearings required by law were not held; (3) that communications between the Authority and the HHFA Agency should be interpreted as plaintiffs contend; and (4) that irregularities exist in the manner of execution and implementation of the loans authorized by the Loan and Grant Contract; we think that they would not be entitled to relief. Alabama Power Co. v. Ickes, supra, 302 U.S. at pp. 478-483; Gart v. Cole, supra, 263 F. 2d at p. 250; Gart v. Cole, supra, 166 F. Supp. at pp. 134-136; Taft Hotel Corporation v. Housing & Home Finance, supra, 262 F. 2d at p. 308. In short, we hold that competitors such as the plaintiff-hotels have no standing to complain of irregularities in the manner of execution of the Redevelopment Plan and the Loan and Grant Contract of 1955, their Amendments and Modifications.

An appropriate order granting the motion for summary judgment will be entered.

Order of Court

AND NOW, to-wit, this 14th day of February, 1962, after hearings on the defendants' motion for summary judgment, and upon due consideration of the briefs and arguments of counsel, it appearing to the court from the affidavits presented by the defendants and from the complaint, deposition, and admissions of the parties, their agents and attorneys, that there is no genuine issue as to any material fact, and that defendants' motion for summary judgment should be granted as a matter of law, IT IS ORDERED, ADJUDGED AND DECREED that summary judgment be and the same hereby is entered in favor of defendant, and the complaint filed by plaintiffs be and the same hereby dismissed.

(signed) RABE F. MARSH
United States District Judge

Opinion of United States Court of Appeals for the Third Circuit

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,014

PITTSBURGH HOTELS ASSOCIATION, INC.;
A PENNSYLVANIA CORPORATION;
CARLTON HOTEL CORPORATION,
A PENNSYLVANIA CORPORATION;
HILTON HOTELS CORPORATION,
A DELAWARE CORPORATION;
ALLEGHENY HOTEL CORPORATION,
A PENNSYLVANIA CORPORATION;
PITTSBURGHER HOTEL COMPANY,
A PENNSYLVANIA CORPORATION; AND
SHERATON MID-CONTINENT CORPORATION,
A DELAWARE CORPORATION,
Appellants

v.

THE URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH, A PENNSYLVANIA CORPORATION, AND LEON FALK, JR., JOSEPH S. WOHL AND GOLDEN TRIANGLE MOTOR HOTEL, INC., A PENNSYLVANIA CORPORATION, AND THE CITY OF PITTSBURGH, PENNSYLVANIA,
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued June 22, 1962

Before: BIGGS, *Chief Judge*, GANEY and SMITH, *Circuit Judges.*

OPINION OF THE COURT

(Filed October 22, 1962)

By GANEY, *Circuit Judge.*

Six plaintiffs, a hotel association and five corporations which own and operate hotels in Pittsburgh, Pennsylvania, brought an action allegedly under the Housing Act of 1949,[1] 63 Stat. 413, as amended, 52 U.S.C.A. §1441 et seq., to enjoin Golden Triangle Motor Hotel, Inc., from erecting a hotel on a parcel of land in an officially designated redevelopment area in the City of Pittsburgh until that city "has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof determined that there exists in the area a need for additional units of such housing." The complaint avers that the plaintiffs' hotel business will be adversely affected by the operation of the proposed motor hotel since there is no need now or in the foreseeable future for such a unit in that area. The defendants are the Urban Redevelopment Authority of Pittsburgh ("Authority"), Leon Falk, Jr., Joseph S. Wohl, Golden Triangle Motor Hotel, Inc., and the City of Pittsburgh, Pennsylvania.[2]

1. This statute was enacted to permit the Federal government to make grants and loans to aid municipalities in slum clearance and community redevelopment.

2. Diversity of citizenship does not exist between all of the plaintiffs and all of the defendants.

On January 3, 1952, a contract between the United States, acting through the Federal Housing Administrator, and the Authority was executed. Under the terms of the contract the United States agreed to make an advancement not to exceed $71,700 to the Authority for the purpose of making surveys and plans in preparation for a redevelopment project in the City of Pittsburgh. Apparently, in accordance with the provisions of the Pennsylvania Urban Redevelopment Law of 1945, P.L. 991, as amended, 35 P.S. § 1701 et seq., the City Planning Commission of Pittsburgh completed a plan dated June 7, 1955, for the proposed redevelopment of an area in the Lower Hill district of the City. The area encompasses 46 city blocks and the project is designated as the Lower Hill Redevelopment Project, Redevelopment Area No. 3 ("Project"). The Plan divides the land into commercial, cultural, recreational, educational, residential, parking and open area, and designates the location of streets. Parcel "B" on the Plan contains approximately 5.3 acres abutting Fifth Avenue and Liberty Crosstown Thorofare. This parcel is designated for commercial use and had four streets running across it. One of them is named Chatham Street which was 60 feet wide and was to be used as a public thoroughfare.

The Plan contains a provision that the redeveloper shall devote the land to uses specified in the Plan for such area. The word "Hotel" is listed under the permitted buildings to be erected in the area designated as commercial.[3] Another provision limits the height of any building or structure to be constructed thereon to two stories or

3. Part F. 2b(2)(a) of the Redevlopment Area Plan for Redevelopment Area #3.

twenty feet. Part J of the Plan provides that "This Plan may be modified at any time upon approval of such modification by the Council of the City of Pittsburgh, the City Planning Commission of the City of Pittsburgh and the Urban Redevelopment Authority of Pittsburgh . . ." The Plan was approved by Council of the City of Pittsburgh on July 13, 1955, by Ordinance No. 255.

On August 2, 1954, the Housing Act of 1949 was amended by the Housing Act of 1954, 68 Stat. 590, which authorized the establishment of an urban renewal fund and the grant of monies from that fund for certain specific purposes in accordance with the laws involved and the regulations of the Federal Housing Administrator. Section 312 of that Act, 68 Stat. 629, provides that the Administrator "with respect to any project covered by any Federal aid contract executed, or prior approval granted, by him under title I before the effective date of this Act, upon request of the local public agency, shall continue to extend financial assistance for the completion of such project in accordance with the provisions of said title I in force immediately prior to the effective date of this Act."

On October 11, 1955, the Authority entered into a grant and loan Contract with the United States. The Contract sets forth that "The purpose of the contract is to provide for the extension by the federal government to the Authority of financial assistance under the Housing Act of 1949, as amended prior to the enactment of the Housing Act of 1954, with respect to the project", and states the terms and conditions upon which such assistance will be extended and the understandings of the parties to the Contract as to the manner in which

they contemplate that the Project will be undertaken and carried out. The Contract also provides that the Plan was satisfactory to the Federal Government, and recognized that amendments to the Plan would be made from time to time in conformity with applicable law and the provisions of the Contract, and that the Federal Government agrees to grant and loan money to the Authority to enable it to make Project land available for redevelopment for uses in accordance with the Plan. From time to time there were a number of waivers and amendments to the Contract, and several modifications to the Plan.

Amendments were made to both the Housing Act of 1949 and 1954 by the Act of September 23, 1959, 73 Stat. 654, known as the Housing Act of 1959. Section 410 of that Act, 42 U.S.C.A. § 1456(g), amended § 106 of the Housing Act of 1949, 63 Stat. 413, by adding the following sub-section:

> "(g) No provision permitting the new construction of hotels or other housing for transient use in the redevelopment of any urban renewal area under this title shall be included in the urban renewal plan unless the community in which the project is located, under regulations prescribed by the Administrator, has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof determined that there exists in the area a need for additional units of such housing."[4]

4. Prior to this addition, there was no provision in the law requiring a preliminary survey with regard to urban renewal plans.

By Modification No. 2, approved by Council of the City of Pittsburgh on September 27, 1960, Chatham Street was removed from Parcel "B" of the Plan.

In November of 1960, Leon Falk, Jr., and Joseph S. Wohl, private redevelopers, made a proposal to the Authority for a six month option to enter into a 99 year lease for the purpose of redeveloping Parcel "B" "with an eight-story motor hotel in excess of twenty feet in height." Later Falk and Wohl formed a corporation known as Golden Triangle Motor Hotel, Inc., for the purpose of exercising the option and developing the parcel of land in question. On June 8, 1961, a six month option contract was signed by the Authority and Golden Triangle Motor Hotel, Inc. The Federal Government has approved the proposed redevelopment of Parcel "B" by means of the construction of the motor hotel. Neither the City of Pittsburgh nor the Authority has caused to be made an independent analysis or a survey of the local existence of transient housing facilities for the purpose of determining the need f[illegible] the proposed motor hotel.

On July 31, 1961, the six plaintiffs brought the action here involved. The above option was to have expired in November of 1961, but repeated extensions necessitated by the litigation have been granted. The Federal Government has consented to the extensions. On September 7, 1961, defendants moved for summary judgment on the grounds that (1) plaintiffs had no standing to maintain the action, (2) that the statute relied upon by plaintiffs was not applicable, and if it were, that statute could not be applied constitutionally to this project. After a number of hearings, the District Court for the Western District of Pennsylvania on

February 14, 1962, ordered that summary judgment be entered in favor of defendants and that the complaint be dismissed. 202 F. Supp. 486. From this order plaintiffs have appealed.

We agree that the dismissal of the complaint was proper. The Housing Act of 1949, as amended prior to the effective date of the Housing Act of 1959, did not give the plaintiffs standing to sue in this action.[2] *Taft Hotel Corporation v. Housing and Home Finance Agency*, 162 F. Supp. 538 (D.C. Conn. 1958), aff'd. per curiam 262 F. 2d 307 (C.A. 2, 1958); Gart v. Cole, 166 F. Supp. 129 (D.C. S.D. N.Y. 1958), aff'd. 262 F. 2d 244, 250 (C.A. 2, 1958). Nevertheless, plaintiffs maintain that subsection (g) of §410 of the Housing Act of 1959, 42 U.S.C.A.

[2] Section 9 of the Pennsylvania Urban Redevelopment Law, 35 P.S. § 1709, provides: "An Authority shall constitute a public body corporate and politic, exercising public powers of the Commonwealth, as an agency thereof, which powers shall include all powers necessary or appropriate to carry out and effectuate the purposes and provisions of this act . . ." Despite this broad language, the Supreme Court of Pennsylvania has ruled that: "The redevelopment Authorities are purely administrative bodies enjoying no important power which is not subject to the approval of the city council and the county commissioners. The Authorities cannot independently exercise any municipal functions. Moreover, they are public bodies and not special commissions or private corporations within the meaning of the constitutional prohibition [of the Commonwealth]." See *Belovsky v. Redevelopment Authority of Philadelphia et al.*, 357 Pa. 329, 343 (1947), 54 A. 2d 277, 172 A.L.R. 953.

One of the items listed under § 9 as subsection (q) is "To sue and be sued." But giving consent to be sued does not confer jurisdiction upon a Federal district court over a controversy involving the Authority.

Plaintiffs do not claim that the Housing Act of 1949, as amended, is unconstitutional. They do not seek to restrain the enforcement of a Pennsylvania statute as being unconstitutional on its face (which would have required the convening of a three-judge statutory court), or seek to restrain the action of State officers who are enforcing a State statute in an unconstitutional manner. Nor do they assert that the enforcement of State law deprives them of due process of law or denies them the equal protection of the laws.

§1456(g), by implication, if not in terms, gives them a standing to sue for the matters averred in the complaint. On the other hand, defendants argue that we need not consider the effect of that subsection because, as allowed by §312 of the Housing Act of 1954, the Authority requested the Administrator to continue to extend financial assistance in accordance with the provisions of the laws in force immediately prior to August 2, 1954, and hence the Authority is not governed by and need not comply with the 1959 amendments. Even assuming that the granting of advancements for the preparation of the Plan amounted to "prior approval granted," by the Administrator under §312 of the 1954 Act, we need not rule whether such prior approval and the request by the Authority had the effect claimed by defendants,[6] because subsection (g) of §410 does not, in our opinion, give plaintiffs a standing to sue in the action here involved. However, even if it did so, the subsection, by its terms, does not require that a survey be made before the proposed hotel may be built on that plot of ground designated as Parcel "B" on the Plan. The subsection does not prevent all future new construction of hotels or other housing for transient use unless a survey is made. It simply provides that *no provision* permitting

6. Prior to its final passage, the proposed amendments had contained a provision directing the Federal Housing Administrator to amend existing contracts between the Government and the local urban renewal authorities in order to bring such contracts into conformity with changes set forth in the proposed amendments. Since the Committee on Banking and Currency understood that existing law permitted those contracts to be amended to incorporate the provisions of the proposed Act, the above proposed provision was deleted. See S. Rep. No. 924, Sept. 8, 1959, 86th Cong., 1st Sess., 1959 U.S. Code Cong. and Adm. News, p. 2846. Moreover, on this point the Federal Housing Administrator should be heard, but he is not a party to the action.

such construction shall be included in the *urban renewal plan* unless it is determined that there is a need for such construction after an independent survey of the local suply has been made. Although the subsection requiring a survey does not specifically restrict the words "no provision" to future ones only, and it might be wise to employ the safeguard of that subsection here, in the absence of reliable indicia showing a Congressional intent that the words include past approved ones, the subsection is not to be applied retroactively, that is applied to urban renewal plans containing a provision permitting the construction of a transient housing unit which had been approved before the effective date of the 1959 Act. This is the usual statutory interpretation. See *Peony Park v. O'Malley*, 223 F. 2d 668, 671-672 (C.A. 8, 1955), cert. den. 350 U.S. 845. The requirement of a survey and a determination of the need for such transient housing unit applies only to urban renewal plans having no provision for that unit which had been approved prior to the effective date of the 1959 Act. Here, there is such a provision in the urban renewal Plan officially approved on October 11, 1955. This was almost 4 years before the effective date of the Housing Act of 1959.

Plaintiffs point out that under this interpretation of subsection (g) a hotel can be built, as may be the case here, many years after the approval of the original plan when the need for such unit will be much less than it was when the provision was approved. Conceding this to be a possibility, it is also possible that the need may become greater. Additionally, a radical change in the facts developed by the survey may take place even if plaintiff's interpretation were to be the accepted one. Even though,

after a survey, a determination is reached that there is need for a hotel, between the time of that determination and the actual operation of that housing unit, the need for it may likewise disappear. Moreover, as time passes, the eventuality similar to that which the plaintiffs seek to prevent here will vanish. We think Congress was aware of this eventuality when it wrote subsection (g).[7]

That the Plan regarding Parcel "B" was changed after the effective date of the 1959 Act by the removal of a street upon which no structure was permissible and that the height of the proposed hotel will violate a restriction set forth in the Plan does not nullify the fact that a provision permitting the construction of a hotel existed prior to the effective date of the 1959 Act. Of course, any change, no matter how slight, in the Plan is *pro tanto* a modification of the Plan. But the paragraph allowing modification of the Plan at any time is part of the provision permitting the use of the land by the construction of a hotel thereon. A point may be reached where a modification of a provision will be such as to change the provision into a new one. The changing of land marked for residential use to commercial might be one example. At what point the transition occurs we need not determine here. Suffice it to say that

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7. In the fall of 1957, the Subcommittee on Housing held extensive hearings in many parts of the country to develop information regarding urban renewal and low-rent housing programs. The Senate Report to the proposed legislation concerning the Housing Act of 1959 states: "During consideration of housing legislation in 1957, many members of the committee became alert to the need for projecting Federal participation in both those programs into future years on a sustained and predictable basis, and with emphasis upon *local* responsibility and autonomy." (Italics supplied.) See S. Rep. No. 924, 86th Cong., 1st Sess. (Sept. 8, 1959), 1959 U.S. Code Cong. and Adm. News, p. 2845.

we think that the removal of Chatham Street and the structural height restriction did not change the provision of the Plan into a new one.

The order dismissing the complaint will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the order of February 14, 1962 of the said District Court dismissing the complaint be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
Clerk

October 22, 1962